

No. 76-22

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

DOUGLAS FRUCHTMAN, PETITIONER

v.

FRANK KENTON, WARDEN

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 531 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on April 9, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on July 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's failure to advise petitioner before accepting his guilty plea that he was waiving the rights of confrontation and compulsory process and that his conviction might subject him to deportation

(1)

proceedings justified vacation of his plea on collateral attack.

STATEMENT

Petitioner, a Canadian citizen, was indicted by a grand jury in the United States District Court for the Central District of California on three narcotics charges. At his arraignment, while represented by retained counsel, petitioner pleaded guilty to one count of the possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

Before accepting his plea, the court asked petitioner, pursuant to Fed. R. Crim. P. 11¹, whether he had discussed the matter with and been thoroughly advised by counsel; whether he understood that by pleading guilty, he was waiving his privilege against self-incrimination and his right to a jury trial at which the government would be required to prove every element of the offense beyond a reasonable doubt; and whether his plea was the result of any promises regarding the length of sentence

¹At the time petitioner entered his plea, Rule 11 provided, in pertinent part:

The court may refuse to accept a plea of guilty, and shall not accept such plea * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Effective December 1, 1975, Rule 11 was amended to add a new subsection (c), which provides that the trial judge must expressly determine before accepting a guilty plea that the defendant understands, *inter alia*, his right to confront and cross-examine the witnesses against him at trial. Although it is inapplicable to his case (see Pet. App. A, p. 2, n. 1), petitioner has set forth the text of the newly amended Rule 11(c) in Appendix D to his petition.

to be imposed. Petitioner responded appropriately to each question (Pet. App. E, pp. 13-19). The court and the prosecutor also informed petitioner that the maximum penalty for this offense was fifteen years' imprisonment, a \$25,000 fine, and a special parole term of at least three years. Petitioner replied that he understood the maximum penalties provided for the offense and that he was pleading guilty voluntarily. He also admitted that he had knowingly attempted to distribute a quantity of cocaine on November 7, 1973, as charged in the indictment (Pet. App. E, pp. 17-18).

The court also questioned petitioner's lawyer, who stated that he had fully advised petitioner and that he concurred in the plea, which, in counsel's view, was being entered voluntarily and with knowledge of its consequences (Pet. App. E, p. 18). The court thereupon accepted petitioner's guilty plea and subsequently sentenced him to eighteen months' imprisonment, to be followed by three years' special parole (Pet. App. F, p. 25).

Ten months after the entry of his plea, petitioner filed the instant petition in the district court pursuant to 28 U.S.C. 2255 seeking to vacate his conviction. He contended that in its Rule 11 inquiry, the district court improperly failed to inquire whether he understood that he would waive the rights of confrontation and compulsory process by pleading guilty and to advise him that entry of a guilty plea would subject him to deportation proceedings. The district court denied relief without a hearing, and the court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 5) that his plea was not entered voluntarily and thus was invalid because the district court did not specifically advise him that he was

waiving his rights of confrontation and compulsory process by pleading guilty.

At the time of petitioner's arraignment, Fed. R. Crim. P. 11 provided that the district court should not accept a guilty plea without first "determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Contrary to petitioner's assertion (Pet. 6-8), the district court was not required to inform him of a specific, talismanic set of rights he was waiving in order for his guilty plea to be valid. See *Brady v. United States*, 397 U.S. 742. Rather, "the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31.

Here, the record demonstrates that the district court adequately satisfied its obligation under Rule 11 to determine that petitioner's plea was voluntary and intelligent. The court advised him that he had a constitutional right to a jury trial at which the government would bear the burden of proving his guilt beyond a reasonable doubt by competent evidence, and that by pleading guilty, he was waiving his right to a trial and his privilege against compulsory self-incrimination (Pet. App. A, pp. 6-7). Where petitioner thus was sufficiently informed of his fundamental rights, the district court's failure to recite a complete litany of the constitutional rights waived by his guilty plea did not violate Rule 11. *United States v. Gearin*, 496 F. 2d 691, 696 (C.A. 5); *Wade v. Coiner*, 468 F. 2d 1059 (C.A. 4); *Sappington v. United States*, 468 F. 2d 1378 (C.A. 8), certiorari denied, 411 U.S. 970. Moreover, the court specifically questioned both petitioner and his attorney concerning

the voluntariness of the plea and further established that there was a factual basis for the plea.²

2. Petitioner also contends (Pet. 9) that his plea was not made with full understanding of its consequences because the district court did not advise him that a guilty plea to a narcotics offense would subject him to deportation proceedings. However, all the courts of appeals that have considered this claim have uniformly rejected it. See *Nunez Cordero v. United States*, 533 F. 2d 723 (C.A. 1); *Michel v. United States*, 507 F. 2d 461 (C.A. 2); *United States v. Sambro*, 454 F. 2d 918 (C.A. D.C.); *United States v. Parrino*, 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840.

As the court of appeals observed (Pet. App. A, p. 7), a deportation order is not entered by the court that accepts the guilty plea but is the result of a separate administrative proceeding, which must be initiated by another agency over which the court has no control and for which it has no responsibility. It is well established that when accepting the defendant's guilty plea, the court need not advise a defendant of such collateral consequences. *Michel v. United States*, *supra*, 507 F. 2d at 465; see *Cuthrell v. Director, Patuxent Institution*, 475 F. 2d 1364 (C.A. 4), certiorari denied, 414 U.S. 1005.

Rule 11 does not require the court to anticipate all possible ramifications of a guilty plea for a defendant.

²In any event, due to the amendment of Rule 11 effective December 1, 1975, to require that the district court determine that a defendant understands his right of confrontation before accepting his plea, the issue presented here is of little prospective significance.

Indeed, there is no indication in the record that the district court was even aware that petitioner was an alien when it accepted his plea. The court of appeals therefore correctly held that "[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such consequence as that here involved would impose an unmanageable burden on the trial judge and 'only sow the seeds for later collateral attack' " (Pet. App. A, p. 7). See *Michel v. United States*, *supra*, 507 F. 2d at 466.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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